NO. 856541

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 39921-1-II

WAFERTECH LLC,

Petitioner,

v.

BUSINESS SERVICES OF AMERICA II, INC.,

Respondent.

BRIEF OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS

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I. INTRODUCTION

Washington Defense Trial Lawyers ("WDTL"), an organization of lawyers representing defendants in civil litigation, appears on occasion as amicus curiae on a pro bono basis. It submits the following brief in support of WaferTech LLC and urges this Court to ***reverse*** the decision of the Court of Appeals and reinstate the trial court's dismissal of this action for want of prosecution.

II. SUMMARY OF ARGUMENT

Washington Defense Trial Lawyers joins Petitioner WaferTech LLC ("WaferTech") in its request that the Court ***reverse*** the decision of Division II of the Court of Appeals and continue to allow the Washington state superior courts to exercise their inherent authority to manage their dockets and dismiss cases for want of prosecution where a plaintiff's failure to prosecute its case constitutes more than mere inaction and prejudices the defendant.

The Court of Appeals concluded that this case falls within the ambit of CR 41(b)(1) and in particular the last sentence of that rule: "If the case is noted for trial before the hearing on the motion, the action shall not be dismissed." But this Court has previously recognized that, if a plaintiff engages in conduct beyond "mere inaction," CR 41(b)(1) does not apply, and a trial court may exercise its discretion to dismiss the plaintiff's case. *See Snohomish County v. Thorp Meats*, 110 Wn.2d 163,169, 750 P.2d 1251 (1988).

This Court should conclude that plaintiff Business Services of America II, Inc. ("BSA") engaged in more than "mere inaction." BSA affirmatively

represented to both the trial court and WaferTech that it had abandoned its case. BSA allowed the trial court to destroy 1,551 trial exhibits—conduct that prejudiced not only WaferTech but also the trial court. And BSA specifically told both the trial court and WaferTech that the lawsuit was done.

The courts should not permit a litigant, whether plaintiff or defendant, to act in a manner that unfairly prejudices the other party's ability to present its case at trial. In keeping with that axiom, a defendant should not have to guess when the plaintiff intends to schedule a trial after already advising the Court that it was not interested in another trial. At a minimum, if a plaintiff takes affirmative steps that demonstrate its intent to abandon the litigation, a trial court should be able to take the party at its word and exercise its inherent authority to manage its docket and dismiss the lawsuit for want of prosecution. This rule—which is consistent with this Court's precedents—would promote the sound policy of encouraging litigants to prosecute their cases in a timely manner. By contrast, affirming the decision of the Court of Appeals would reward litigants who sleep on their cases, only later to revive them, to the prejudice of defendants in particular and the judicial system as a whole.

In light of these considerations, the WDTL respectfully requests that the Court conclude that BSA's conduct constituted more than "mere inaction," thus removing it from the safe harbor provision set out in the last sentence of CR 41(b)(1). The Court should conclude further that the trial court did not abuse its discretion in dismissing the action for want of prosecution. Having reached these conclusions, the Court should reverse the decision of the Court

of Appeals and reinstate the trial court's dismissal of BSA's lawsuit for want of prosecution.

III. ANALYSIS

A. A Trial Court Has Discretion to Dismiss a Case for Want of Prosecution If the Plaintiff Engages in Conduct Other Than Mere Inaction That Warrants Dismissal

In the absence of a rule or statute to the contrary, courts retain the inherent authority to manage their dockets: "A court of general jurisdiction has the inherent power to dismiss actions for lack of prosecution, but only when no court rule or statute governs the circumstances presented." *Snohomish County v. Thorp Meats*, 110 Wn.2d 163,166–67, 750 P.2d 1251 (1988). CR 41(b)(1) is a court rule that governs some, but not all circumstances in which a court may dismiss an action for lack of prosecution. CR 41(b)(1) does not apply to the circumstances presented here. Consequently, the trial court properly exercised its inherent power and dismissed BSA's case.

CR 41(b)(1) is a narrow exception to a trial court's inherent authority to control its docket, and it applies only when a party seeks dismissal based on mere inaction or passage of time. *See, e.g., Wallace v. Evans,* 131 Wn.2d 572, 577, 934 P.2d 662 (1997). As the court explained in *Gott v. Woody,* "[W]here the *mere inaction* of a party gives rise to a motion to dismiss for want of prosecution by the adversary, CR 41(b)(1) limits the discretionary authority of the court to dismiss on that ground. 11 Wn. App. 504, 504–05, 524 P.2d 452 (1974) (emphasis added).

By contrast, when "dilatoriness of a type not described by CR 41(b)(1) is involved," courts may exercise their inherent authority and discretion to dismiss a case for want of prosecution. *Thorp Meats*, 110 Wn.2d at 169. "Dilatoriness of the type *not* described by CR 41(b)(1) refers to unacceptable litigation practices other than mere inaction." *Foss Maritime Co. v. City of Seattle*, 107 Wn. App. 669, 674, 27 P.3d 1228 (2001).

The question in this case is whether BSA engaged in more than mere inaction, thus taking this case out of the scope of CR 41(b)(1). The record confirms that the trial court dismissed BSA's claim because of more than "mere inaction." Instead, BSA took affirmative steps confirming that it had abandoned its case.

First, after the Court of Appeals remanded the case to the trial court, the plaintiff made no attempt to schedule a new trial for a period of 16 months. After 16 months had lapsed, the trial court advised the parties that it intended to destroy the trial exhibits. The threatened destruction of the trial exhibits was no minor matter: the parties had filed 1,551 trial exhibits with the court. BSA responded to the trial court's inquiry with a very eloquent silence—a silence that told the court and WaferTech that BSA did not intend to pursue its claims. BSA's silence in the face of the forthcoming destruction of the exhibits constituted more than "mere inaction." That acquiescence unfairly prejudiced both the trial court and WaferTech.

Second, BSA's own counsel filed a notice of intent to withdraw in which he expressly represented to the trial court and WaferTech that the "case

[had] been dismissed and judgment entered thereon against plaintiffs." Again, this conduct constitutes more than "mere inaction": it was instead an affirmative act that had the foreseeable effect of lulling the court and WaferTech into believing precisely what plaintiff's counsel claimed—that the case had been dismissed. This conduct constitutes significantly more than mere inaction over an extended period of time. Instead, this conduct provides a clear example of the "unacceptable litigation practices" referenced in *Foss Maritime*. *See* 107 Wn.App. at 674.[1]

BSA's express conduct took this case out of the purview of CR 41(b)(1) and placed it squarely within the trial court's discretion and inherent authority to manage its docket and dismiss the case for want of prosecution. Because this case does not implicate CR41(b)(1), this Court should instead conclude that the trial court did not abuse its discretion in dismissing the action for want of prosecution.

B. Sound Policy Reasons Support Affirming the Decision of the Trial Court

One of the fundamental premises of our judicial system is that a litigant cannot act or fail to act in manner that unfairly prejudices the opposing party

[1] In this regard, the doctrine of judicial estoppel should preclude BSA from retreating from the representation made by its attorney to the court. The doctrine of judicial estoppel prevents a party from asserting a particular position in a judicial proceeding and later taking an inconsistent position in order to gain an advantage. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). "The gravamen of judicial estoppel is the intentional assertion of an inconsistent position that erodes respect for the judicial process and the courts." *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 950, 205 P.3d 111 (2009). In this case, BSA took inconsistent positions, and its conduct "erode[d] respect for the judicial process and the courts."

without being subject to some sanction. If BSA is allowed to pursue its case, this assumption will be turned on its head: the dilatory litigant will suffer no consequences for its gross failure to prosecute its claims. Indeed, it will suffer no consequences for its acquiescence in the destruction of original court records or for its affirmative representation that the case was completed.

A plaintiff should not be allowed to engage in conduct that signals its abandonment of its claim and then spring into action years later. The plaintiff is the master of its case, and it has an affirmative duty to prosecute its claims. Otherwise, it loses the right to prosecute it at all. A plaintiff should lose its right to prosecute its case if it takes affirmative steps directed to the court and defendant signaling unambiguously that it has abandoned its case. BSA gave precisely such signals to the trial court and the opposing party. The Court should not permit it to revive its long-dead case to the prejudice of WaferTech and the trial court.

In this regard, the WDTL urges the Court to consider the fact that the Washington trial courts are terribly overburdened. In the last several years, the courts' resources have experienced a significant decline.[2] In this fiscal climate, this Court should not impose additional restrictions on the state trial courts' discretion to manage its own docket. Allowing plaintiffs to resurrect stale and long-neglected cases will impose additional burdens on the courts. As the trial

[2] *See, e.g.*, Stephen M. Warning, "With Budget Cuts, Courts May Struggle to Retain Order in Society," *The Olympian* (30 Apr. 2011), available at http://www.theolympian.com/2011/04/30/1635157/with-budget-cuts-courts-may-struggle.html (last viewed October 7, 2011).

court in this matter observed, this case "epitomizes why [the courts] have standards [to get] cases resolved."

IV. CONCLUSION

If a plaintiff engages in litigation conduct beyond mere inaction, CR 41(b)(1) does not apply, and the trial court has the inherent authority to dismiss the case for want of prosecution. BSA's conduct went far beyond "mere inaction" and thus does not fall within the safe harbor provision of CR 41(b)(1). The Court should therefore conclude that the trial court did not abuse its discretion in dismissing the action for want of prosecution.

DATED this 7th day of October, 2011.

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